

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jul 06, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT J. DALE, individually,

Plaintiff,

v.

AMC WEST HOUSING LP, and BBC  
AF MANAGEMENT/DEVELOPMENT,  
LLC,

Defendants/Third-Party Plaintiffs,

v.

THE DAVEY TREE EXPERT  
COMPANY,

Third-Party Defendant.

No. 2:20-CV-00256-SAB

**ORDER DENYING THIRD-  
PARTY DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court is Third-Party Defendant's Motion for Summary Judgment, ECF No. 37. The motion was considered without oral argument. Plaintiff Robert J. Dale ("Mr. Dale") is represented by Bradley Axtell and Michael Felice. Defendants/Third-Party Plaintiffs AMC West Housing LP and BBC AF Management/Development, LLC (collectively, "AMC West") are represented by Michael Jaeger and William Simmons. Third-Party Defendant The Davey Tree Expert Company ("Davey Tree") is represented by Francis Floyd, Brittany Ward, and Emily Albrecht.

**ORDER DENYING THIRD-PARTY DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT \*1**

1 This case is an action for damages arising out of an accident in August 2017  
2 at the Fairchild Air Force Base in Spokane, Washington, when resident Plaintiff  
3 Robert J. Dale was struck by a tree limb and sustained a brain injury. Mr. Dale  
4 contends that he and several other residents made complaints about dead trees, and  
5 the specific tree that harmed him, and AMC West ignored their complaints. AMC  
6 West is under contract with the U.S. Government to maintain Fairchild. AMC  
7 West denies all claims against it and brings a third-party claim against Davey Tree  
8 for breach of contract, alleging that the injuries suffered by Mr. Dale arise out of its  
9 services or failure to perform services. Davey Tree also denies all claims against it.

10 Davey Tree moves for summary judgment on AMC West's breach of  
11 contract claim. It contends that AMC West has presented no viable theory of its  
12 contractual liability, and therefore, it is entitled to judgment as a matter of law.  
13 AMC West argues Davey Tree was responsible for identifying dangerous trees or  
14 other conditions on the property, and nonetheless, disputes of material fact  
15 preclude summary judgment.

16 The parties disagree on basic facts in this action, including when the  
17 accident occurred. The date of the incident is material to resolving the issue of  
18 Davey Tree's contractual liability. Therefore, the motion is denied.

### 19 LEGAL STANDARD

20 Summary judgment is appropriate "if the movant shows that there is no  
21 genuine dispute as to any material fact and the movant is entitled to judgment as a  
22 matter of law." Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless  
23 there is sufficient evidence favoring the non-moving party for a jury to return a  
24 verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
25 (1986). An issue of material fact is genuine if there is sufficient evidence for a  
26 reasonable jury to return a verdict for the non-moving party." *Thomas v. Ponder*,  
27 611 F.3d 1144, 1150 (9th Cir. 2010). The moving party has the initial burden of  
28 showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*,

1 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-  
2 moving party must go beyond the pleadings and “set forth specific facts showing  
3 that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

4 In addition to showing there are no questions of material fact, the moving  
5 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*  
6 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled  
7 to judgment as a matter of law when the non-moving party fails to make a  
8 sufficient showing on an essential element of a claim on which the non-moving  
9 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party  
10 cannot rely on conclusory allegations alone to create an issue of material fact.  
11 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). When considering a  
12 motion for summary judgment, a court may neither weigh the evidence nor assess  
13 credibility; instead, “the evidence of the non-movant is to be believed, and all  
14 justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255;  
15 *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015).

### 16 MOTION FOR SUMMARY JUDGMENT

17 Davey Tree moves for summary judgment on AMC West’s breach of  
18 contract claim. Davey Tree argues that “[a]ny involvement [it] had with the tree in  
19 question was after the alleged August 10, 2017 incident giving rise to the  
20 underlying lawsuit[.]” ECF No. 37 at 9. It contends that it had no duty to accept  
21 AMC West’s tender of defense or indemnity where it had no involvement with  
22 AMC West until after the subject incident occurred.

23 Conversely, AMC West claims that Davey Tree shared responsibility in  
24 ensuring that the common areas were free from any hazardous condition, including  
25 identifying dangerous tree limbs and branches. AMC West also contends that the  
26 incident date is disputed. It claims the date is material to whether Davey Tree is  
27 contractually liable, because it requested Davey Tree to remove the tree prior to the  
28 incident.

**ORDER DENYING THIRD-PARTY DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT \*3**

1 In this case, the Court finds that the parties' factual dispute regarding the  
2 incident date precludes summary judgment. The record evidence indicates the  
3 incident occurred sometime between August 10 and August 17, 2017. Mr. Dale  
4 alleges the incident occurred on August 10, 2017. However, Mr. Dale presented to  
5 the Sacred Heart Medical Center on August 20 and reported that the date of the  
6 incident had occurred three days earlier, on August 17. In his deposition, Mr. Dale  
7 could not explain the discrepancy in his reporting, nor could he state with any  
8 certainty the date upon which the alleged incident occurred. AMC Community  
9 Manager Dana Childers testified the tree in question was already scheduled to be  
10 removed before the incident, and she notified Mr. Dale of the planned removal two  
11 or three days prior. Meanwhile, Davey Tree states it received a request to remove  
12 the tree in question on August 14. It is also notable that metadata of images of the  
13 purported tree branch, Mr. Dale's head injury, and bloody paperwork and carpet  
14 indicate they were taken on August 11, 2017. ECF No. 42 at 4–6.

15 The Court cannot weigh the credibility of evidence at the summary judgment  
16 stage. *Anderson*, 477 U.S. at 255; *Cortez*, 776 F.3d at 1050. It must construe the  
17 evidence in light of AMC West as the non-moving party. *Id.* Some evidence  
18 indicates Mr. Dale's injury took place after the hazard had been identified and  
19 Davey Tree was engaged to remove the tree. As the date of the incident is material  
20 to resolution of the legal issues in this matter, summary judgment is not  
21 appropriate.

22 Nonetheless, Davey Tree argues that AMC West cannot allege it is  
23 contractually liable for identifying the tree in question for removal, because AMC  
24 West maintains that the tree was not dangerous in fact. The Court disagrees—  
25 AMC West can dispute a prima facie element of Mr. Dale's negligence claim  
26 while also arguing, in the alternative, that Davey Tree is liable under a theory of  
27 comparative negligence or contractual liability.

1 Further, Davey Tree argues the Court should consider its proffered facts to  
2 be undisputed and admitted, because AMC West failed to file a factual statement  
3 as required by Local Civil Rule 56(c)(1)(B). The Court finds AMC West's  
4 response briefing sufficiently puts forth the factual allegations it believes are  
5 disputed. As Davey Tree's reply brief was responsive to AMC West's factual  
6 contentions, there is no prejudice to Davey Tree. Therefore, the Court declines to  
7 find the facts admitted.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Third-Party Defendant's Motion for Summary Judgment, ECF No. 37,  
10 is **DENIED**.

11 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
12 this Order and provide copies to counsel.

13 **DATED** this 6th day of July 2022.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

19 Stanley A. Bastian  
20 Chief United States District Judge  
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